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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 MEGHANN KNICKERBOCKER, et
11 al.,

12 Plaintiffs,

13 v.

14 CORINTHIAN COLLEGES, et al.,

15 Defendants.

16 CASE NO. C12-1142JLR

17 ORDER AWARDING
18 SANCTIONS

19 **I. INTRODUCTION**

20 Before the court are Plaintiffs' first and second motions for sanctions against
21 Defendant Corinthian Colleges, Inc. ("Corinthian"). (1st Mot. (Dkt. # 37); 2d Mot. (Dkt.
22 # 63).) Plaintiffs argue that Corinthian's failure to preserve and subsequent delay in
producing evidence merits sanctions. (*See id.*) Having considered the submissions of the
parties, the balance of the record, and the relevant law, and having heard oral argument
and received supplemental briefing, the court GRANTS Plaintiffs' motions.

II. BACKGROUND

2 Corinthian runs for-profit colleges throughout the United States and Canada. (1st
3 Mot. at 2.) Plaintiffs Janet O'Connell, Lisa Holland, and Meghann Knickerbocker,
4 former employees of Corinthian, filed this action against Corinthian for racial
5 discrimination, harassment, and retaliation in violation of Title VII of the 1964 Civil
6 Rights Act, 42 U.S.C. §§ 2000e *et seq.*, and Washington state law. (See 2d Am. Compl.
7 (Dkt. # 29).) Plaintiffs allege that they were subjected to racially hostile work
8 environments and discrimination at the hands of Corinthian employees, including Sheila
9 Austin, Lisa Cook, Jenna Rygol, and Meredyth Givens. (*Id.*) Plaintiffs allege that this
10 discrimination culminated in termination of their respective employments in late April,
11 2012. (*Id.*)

12 Corinthian received Notices of Charge of Discrimination from the Equal
13 Employment Opportunity Commission (“EOC”) for Ms. Holland and Ms.
14 Knickerbocker shortly after their termination in early May, 2012. (Hainley Decl. (Dkt.
15 # 39-11) ¶¶ 4, 6, 7.) Corinthian received a demand letter from Plaintiffs on May 29,
16 2012. (Demand Let. (Dkt. # 39-2)). Corinthian’s legal department contacted outside
17 counsel, Payne & Fears LLP (“Payne and Fears”); Mr. Alejandro Ruiz of Payne & Fears
18 began handling the matter in June 2012. (See Ruiz Decl. (Dkt. # 39-1) ¶ 7.) Plaintiffs
19 filed this action on July 3, 2012. (Compl. (Dkt. # 1).)

In January, 2013, Plaintiffs' counsel expressed concern about Corinthian's meager document production; multiple discovery conferences and correspondence between

1 Plaintiffs' counsel and Mr. Ruiz followed.¹ (*See* Burke Decl. (Dkt. # 21).) In April or
 2 May, 2013, Mr. Ruiz represented that Plaintiffs' work email accounts were deleted
 3 shortly after Plaintiffs' termination. (Martin Decl. (Dkt. # 38) ¶ 17; Burke Decl. ¶ 17.)
 4 When questioned about backup sources, Mr. Ruiz represented that the information "could
 5 not be extracted without shutting down the servers; in other words, it was not
 6 extractable." (Burke Decl. ¶ 17; *see also* Ruiz Decl. ¶ 17.) This representation would
 7 later prove to be inaccurate. (*See* Brown Decl. (Dkt. # 72) ¶¶ 3, 8 (discussing emails
 8 retrieved from the backup tapes).)

9 Plaintiffs filed a motion to compel responses to certain discovery requests. (Dkt.
 10 # 20.) To resolve this motion, the parties stipulated to an order that the court signed on
 11 June 3, 2013. (Stip. Order (Dkt. # 24).) Mr. Ruiz, on behalf of Corinthian, and Ms.
 12 Margaret Enslow, on behalf of the Plaintiffs, jointly drafted this order. (12/12/13 Trans.
 13 (Dkt. # 62) at 22.) This stipulated order required that, among other things:

14 Defendant, at its own expense, shall conduct a full and complete search for
 15 all documents responsive to Plaintiffs' Requests for Production Nos. 1, 2, 3,
 16 4, 5, and 27, and such search shall include documents on backup servers.

17 (Stip. Order at 3.) Corinthian only produced about 100 pages of additional
 18 documents in response to this order. (Martin Decl. ¶ 18.) On July 1, 2013,
 19 Defendant filed a "Verification of Compliance with Stipulation and Order
 20 Compelling Further Discovery" which verified that:

21 ¹ Ms. Burke's declaration refers to Corinthian's counsel as "Alex Rodriguez." (Burke Decl. ¶ 8.)
 22 After reviewing the remainder of the record, including correspondence attached to Ms. Burke's
 declaration, the court infers that she intended to refer to defense counsel Mr. Alejandro Ruiz. (*See, e.g.,*
 Ruiz Decl.)

1 Corinthian, at its own expense, conducted a full and complete search for all
2 documents responsive to Plaintiffs' Requests for Production Nos. 1, 2, 3, 4,
3 5, and 27 (subject to any and all objections and limitations previously
4 agreed to by the parties) *on all available electronic sources and/or servers*
5

6 (Verification (Dkt. # 33) (emphasis added).) This verification was incorrect in
7 that Corinthian's backup tapes were not searched, despite the fact that Plaintiffs
8 had not agreed that the backup tapes were not "available." (12/12/13 Trans. at
9 29.) The Verification was signed by Mr. Ruiz. (*Id.*)

10 Nonetheless, as discovery continued, Plaintiffs grew increasingly concerned that
11 Defendant had not adequately preserved and collected documents. (Martin Decl. ¶ 19.)
12 In July and August, 2013, various Corinthian employees testified that they had not
13 searched, did not recall searching, and had not been asked to search for documents
14 relevant to the litigation. (*See* Martin Decl. Ex. E (Austin Dep.) at 3; *id.* Ex. F (Givens
15 Dep.) at 7; *id.* Ex. G (Cook Dep.) at 11; *id.* Ex. I (Phillips Dep.) at 12; *id.* Ex. J (Paulino
16 Dep.) at 16.) Mr. Ruiz had assured Plaintiffs that a Rule 30(b)(6) deposition "would
17 better help [them] judge whether Corinthian has reasonable complied with [their]
18 requests." (5/31/13 Ruiz Email (Dkt. # 38-3) at 19.) Accordingly, Plaintiffs' Rule
19 30(b)(6) notice identified topics such as Defendant's "policies, procedures, and practices
20 related to . . . backup procedures for electronically stored information" and "[a]ny and all
21 searches Defendant conducted to find documents responsive to Plaintiffs' discovery
22 requests in the above-captioned litigation, including . . . the location where the documents
are physically or electronically stored . . . and whether any documents could not be
searched or retrieved." (30(b)(6) Notice (Dkt. # 38-4) ¶¶ 18, 21.)

1 Corinthian designated Stanley Banash, Senior Information Technology Director of
2 Information Security, to testify. (*See* Banash Dep. (Dkt. # 38-5).) At deposition, Mr.
3 Banash testified that Corinthian did not issue a litigation hold with respect to Plaintiffs'
4 action, and that, unless there was a litigation hold, Corinthian automatically deleted
5 terminated employees' email accounts 30 days after the employee's termination. (*Id.* at
6 13, 15.) Mr. Banash also testified that he was unaware of how to retrieve information
7 that was stored on Corinthian's backup system. (*See id.* at 9-10 ("I don't run the backup
8 systems, so you've got to talk to somebody who does."))

9 On October 8, 2013, Plaintiffs brought their first motion for sanctions, arguing that
10 Corinthian's discovery tactics had resulted in spoliation of evidence and merited a default
11 judgment. (*See generally* 1st Mot.) At the time, Corinthian's total document production
12 totaled only 1,272 pages. (Ruiz Decl. ¶ 11.) In response, Corinthian asserted that its
13 document search was sufficient, that it had deleted Plaintiffs' email accounts before the
14 duty to preserve was triggered, and that Corinthian was not required to access the emails
15 retained on its backup tapes because the Stipulated Order only referred to backup
16 "servers," not backup "tapes," and retrieval of information on the backup tapes would
17 require "unreasonable" cost and effort. (*See* 1st Resp. (Dkt. # 39); Ruiz Decl. ¶ 17.)

18 To support the second point, Corinthian relied on a declaration by Andrew
19 Ainsworth, Corporate Counsel for Corinthian, stating that it was not possible to
20 determine the date each email account was deleted, and that "a former employee's email
21 account may continue to be stored for up to 30 days before deletion occurs, but that the
22 number of days that elapse between the 'Account Termination Notification' and the

1 account's deletion can vary" (Ainsworth Decl. (Dkt. # 39-6) ¶¶ 2, 7.) However, Mr.
2 Ainsworth's claim that employee email accounts could be deleted anytime *within* 30 days
3 of a termination notification contradicted Mr. Banash's deposition testimony that the
4 accounts were deleted 30 days *after* the IT Department received and implemented a
5 termination notification. (*See* Banash Dep. at 12-13.) Notwithstanding Mr. Banash's
6 testimony, Corinthian argued that it could not be proven that Corinthian deleted
7 Plaintiffs' email accounts after the duty to preserve attached. (*See* 1st Resp. at 11-13.)

8 To address the factual discrepancies advanced by the parties, the court held oral
9 argument and heard testimony from Mr. Banash and Mr. Ainsworth. (12/12/13 Min.
10 Entry (Dkt. # 48); *see generally* 12/12/13 Trans.) At the hearing, Jeffrey Brown, counsel
11 for Corinthian, admitted that, although Corinthian had issued litigation holds in previous
12 litigations, Corinthian did not issue a litigation hold with respect to this case. (12/12/13
13 Trans. at 4-5.) Mr. Brown represented that, instead of issuing a company-wide notice,
14 Corinthian had hand-selected certain employees and requested that they retrieve and
15 retain relevant documents. (*Id.* at 5-7, 12, 18.)

16 Mr. Banash testified as to the process by which terminated employees' email
17 accounts are automatically deleted. (*Id.* at 9, 29-30.) Specifically, within 24 hours of
18 receiving a termination notice from the Human Resources ("HR") Department, the IT
19 Department closes the terminated employee's email account and the account "goes into a
20 30-day holding pattern. After 30 days the email system itself, the exchange system,
21 removes the box. It simply recovers the disk space that it was taking up." (*Id.* at 9; *see also* 29-30.) As to the timing of the deletion, Mr. Banash confirmed: "On the servers

1 [the emails] continue to exist for 30 days. After 30 days from the closure date, the
 2 exchange server itself simply removes the box, deletes it." (*Id.* at 30.)

3 In light of this testimony, Mr. Ainsworth admitted that his declaration stating that
 4 Corinthian deleted terminated employees' email accounts anytime *within* 30 days of
 5 receipt of a notice from HR was incorrect. (*Id.* at 33.) Mr. Ainsworth admitted that he
 6 had not talked to Mr. Banash prior to making his declaration, and that he "was not 100
 7 percent sure" about the number of days at the time he made his declaration. (*Id.* at 32-
 8 34.)

9 Corinthian's counsel, Mr. Brown, conceded that Plaintiffs' email boxes were in
 10 fact deleted pursuant to this practice. (*Id.* at 26 ("With respect to the plaintiffs' email
 11 boxes, no, your Honor. Those emails exist on the backup tapes, but those email boxes
 12 were deleted per the policy that Mr. Banash explained to you.")) Mr. Brown also
 13 conceded that the deletion of Plaintiffs' emails occurred after Corinthian received
 14 Plaintiffs' EEOC notices:

15 If you put an order in that says delete the mailbox in 30 days, should
 16 somebody have spotted the EEOC charges and made the connection and
 17 gotten around and suspended that? That's something I can't argue. That is
 18 something that we have looked at. Yeah, we have to find a way to fix that
 19 system, your Honor. I cannot sit here and tell you that is the best way to do
 20 things.

21 (Id. at 28.)²

22 ² Mr. Brown also explained that no other document destruction program was in place at
 Corinthian. (*Id.* at 7.) Although Plaintiffs pointed to a Corinthian document purporting to establish a six-
 month automatic email deletion policy, the policy was apparently never implemented. (See 1st Mot.)
 Plaintiffs claim that Mr. Ruiz represented that the reason Corinthian had produced so few emails was due

1 Mr. Brown and Mr. Banash maintained that all employee email accounts were
2 preserved on Corinthian's backup tapes. (*See id.* at 9, 15, 17, 18.) Specifically, Mr.
3 Brown averred that:

4 First of all, there are backup tapes that have every single email that has
5 been referred to on them. Every single day that Corinthian has operated in
6 Bremerton there are backup tapes with those e-mails. Everything we are
7 talking about in this motion has been preserved and is available.

8 (*Id.* at 17.)

9 Plaintiffs' counsel explained that they first learned of the backup tapes in May,
10 2013, at which time Mr. Ruiz represented that retrieving information from the tapes
11 would require shutting down the system for 72 hours and would be prohibitively
12 expensive. (12/12/13 Trans. at 22-23 (testimony by David Martin); *see also* Ruiz Decl.
13 ¶ 17 ("I explained that it was unreasonable and impractical to search them because
14 retrieval of any information from those tapes would require dedicated servers to which
15 the information would need to be downloaded (sequentially) and configured"))
16 Because Mr. Banash had proven unable to address this topic during his 30(b)(6)
17 deposition, Plaintiffs' counsel possessed little other knowledge regarding the backup
18 tapes. (12/12/13 Trans. at 31-32; *see also* *id.* at 23.)

19 Mr. Brown took the position that the Stipulated Order's requirement for a "full and
20 complete search" that "shall include documents on backup servers" did not extend to
21 documents kept on backup tapes, because "[t]he tape is an entirely different ballgame

22 to the alleged six-month deletion policy (*see, e.g.*, Burke Decl. ¶ 17); Corinthian disputes that Mr. Ruiz
ever made such a representation.

1 from the servers.” (*Id.* at 20, 21-22; *see also id.* at 21 (testimony by Mr. Banash
2 confirming that Corinthian has both backup tapes and backup servers).) Plaintiffs’
3 counsel, on the other hand, claimed that they were not aware that Corinthian intended to
4 draw a “distinction between backup servers and backup tapes,” and that they understood
5 the Stipulated Order to refer “generally to backup media.” (*Id.* at 22, 24-25 (testimony by
6 Margaret Enslow).) Similarly, with respect to the Verification of Compliance, which
7 affirmed that Corinthian had searched “all available electronic sources and/or servers,”
8 Plaintiffs maintained that they had not agreed that the backup tapes were not “available.”
9 (*Id.* at 30 (testimony by Mr. Martin).)

10 Mr. Brown emphasized multiple times that accessing the information on the
11 backup tapes would solve the spoliation problem facing the court. (*See id.* at 38 (“And
12 the answer is lying right under our noses. We brought it up in April. We can go get
13 those tapes. If there is something supposedly in Michelle Paulino’s mailbox, we can look
14 at it. . . . We can do that. A thousand dollars a day and it is here and we are done.”); *id.*
15 at 27 (“THE COURT: Is it your position, sir, that that is not an intentional deletion of
16 information once you are on notice of litigation? MR. BROWN: Your Honor, number
17 one, that is my position, because the emails exist on the backup tapes. And we can get
18 them.”); *id.* at 20 (“I know those things are still there. I can tell you, it is about a
19 thousand dollars per day of recovery time. It can be done. It is sitting there.”))

20 Mr. Brown represented that the cost of retrieval would not be as excessive as the
21 court feared: it was possible to recover all employee emails that predated a certain date
22

1 because the backup tapes stored nightly snapshots of the state of the system. (*See id.* at
2 38-39.) Specifically, Mr. Brown engaged in the following dialogue with the court:

3 THE COURT: You are sitting here telling me over and over and over
4 again, we have the backup tapes, it solves the entire problem. I don't know
5 if we can go back to 2004, but that would be, what, 365 days a year times
6 ten years at \$1,000. . . . Corinthian is going to have a very large bill.

7 MR. BROWN: The one day is a snapshot, though. For example, if you
8 asked how would the world be different if we had sent a litigation hold that
9 stopped the deletion of one of the plaintiffs' emails, all we need—you can
10 look at the termination date and get the backup tape for that date, and now
11 you have got their email box exactly how it existed as of the date of their
12 termination. *It would be perfect. It would be one day, \$1,000.* If you
13 wanted that for ten employees, then you get to \$10,000. You don't have to
14 do it as separate days, because it is cumulative.

15 THE COURT: I think what I want it for, sir, is every employee of
16 Corinthian, because I have no confidence in your search. . . .

17 MR. BROWN: . . . With respect to every employee, if you are looking at
18 every employee at the Bremerton campus where this occurred, we can do
19 that, your Honor. It can be done. We are not going to have to pay
20 individually for each employee. If the backup tape for one day—That is
21 across the whole campus. We can capture everybody that way. . . .

22 (Id. (emphasis added).)

23 Crediting Mr. Brown's representations that recovering data from the backup tapes
24 "would be perfect. It would be one day, \$1000[,]" the court deferred ruling on Plaintiffs'
25 motion and instead issued an order compelling production from the backup tapes. (*See*
26 Order Compelling Prod. (Dkt. # 49).) The order required Corinthian to "retrieve from the
27 backup tapes all employee email accounts as they existed on or near the date that the last
28 Plaintiff's employment was terminated" and to "search the retrieved information
29 according to the terms articulated in the parties' stipulated order." (*Id.* at 4.) Because the

1 parties' trial date of January 6, 2014, was looming in less than one month, the court set a
 2 deadline of December 20, 2013. (*Id.* (requiring production by December 20, 2013).)

3 At the pretrial conference on Wednesday, December 18, 2013, Mr. Brown
 4 represented that Corinthian had hired an outside vendor, had begun retrieving the emails
 5 corresponding to the date of April 27, 2012, and would "ship what we can on Friday."
 6 (PTC Trans. (Dkt. # 61) at 28-29.) The very next day, however, Mr. Ruiz called to
 7 inform the court that Corinthian would not be able meet the Friday deadline. Mr. Ruiz
 8 stated that the vendor believed it would take at least 12 more days to retrieve the data. At
 9 a telephone conference with the parties on December 23, 2013, Mr. Brown stated that the
 10 document recovery could be completed, at the earliest, by December 31, 2013, but
 11 declined to commit to a firm date. (*See* Dkt. # 58; Enslow Decl. (Dkt. # 64) ¶ 4.) The
 12 following day, Plaintiffs agreed to vacate the parties' January trial date. (*See id.*)

13 On January 2, 2014, Corinthian filed a status report indicating that it could not
 14 produce the emails of four employees until January 6, 2014, and could not produce the
 15 emails of three other employees until January 13, 2014. (1st Status Rep. (Dkt. # 59) at 2-
 16 3; *see also* Enslow Decl. ¶¶ 6, 7.) During a telephone conference on January 13, 2014,
 17 Corinthian's counsel represented that Corinthian would produce emails from all other
 18 employees by January 27, 2014.³ (Enslow Decl. ¶ 8; Brown Decl. ¶ 8.) Corinthian

19
 20 ³ Despite the plain language of the court's order, which required Corinthian to "retrieve from the
 21 backup tapes *all employee email accounts*" and to "search the retrieved information according to the
 22 terms articulated in the parties' stipulated order," (Order Compelling Prod. at 4 (emphasis added)), Mr.
 Plaintiffs disagreed and Mr. Brown eventually agreed to produce the remaining emails. (*Id.*)

1 missed this deadline; the remaining emails were not produced until February 10, 2014.
 2 (Brown Decl. ¶¶ 9-10; *see also* 2/3/14 Min. Ord. (Dkt. # 65).)

3 All in all, Corinthian eventually produced about 3000 additional emails from the
 4 backup tapes. (Brown Decl. ¶¶ 8, 11; Enslow Decl. ¶¶ 6, 7.) By comparison,
 5 Corinthian's original entire discovery production up to that point encompassed only 110
 6 email strings and 1270 pages of other documents. (2d Resp. (Dkt. # 66) at 8 n.5 (citing
 7 Ruiz Decl. ¶¶ 8-13).) Corinthian finished production of the emails more than seven
 8 weeks after the court's original deadline.⁴ (*See* Brown Decl. ¶¶ 9-10; Order Compelling
 9 Prod. at 4.)

10 It cost Corinthian \$7530.00 in vendor fees to recover the emails. (*See* Tetzlaff
 11 Decl. (Dkt. # 70) ¶ 30, Ex. N.) Corinthian also claims to have incurred the "cost-
 12 equivalent" of approximately \$11,600.00 in employee time dedicated to restoring the
 13 backup tapes (*see id.* ¶ 31), but provides no documentation to substantiate that claim.

14 Due to the volume of new documents produced, the court reopened discovery and
 15 rescheduled trial at the end of the court's trial calendar for November 3, 2014. (2/3/14
 16 Min. Order; *compare* Sched. Order I (Dkt. # 11) *with* Sched. Ord. II (Dkt. # 74).)
 17 Plaintiffs now bring a second motion for sanctions; this motion is predicated on the same
 18

19 ⁴ The recovery process proved considerably less straightforward than Mr. Brown represented at
 20 oral argument. The first vendor Corinthian hired was unable to retrieve any information from the backup
 21 tapes. (*See* Burkhart Decl. (Dkt. # 68); Tetzlaff Decl. (Dkt. # 70).) The tapes were returned to
 22 Corinthian, who managed to recover and produce some emails itself. (*See* Tetzlaff Decl.; Banash Decl.
 (Dkt. # 71).) Corinthian then hired a second vendor to complete recovery of the emails; after some delay,
 this vendor was able to retrieve only a subset of the remaining emails. (*See id.*; Morgan Decl. (Dkt. #
 69).) The tapes were once again returned to Corinthian, who eventually recovered and produced the final
 subset of emails. (*See* Tetzlaff Decl.; Banash Decl.; Brown Decl.)

1 facts as Plaintiffs' first motion, as well as on Corinthian's actions in the interim. (*See*
 2 *generally* 2d Mot.) The court heard oral argument on this motion on March 21, 2014.
 3 (*See generally* 3/21/14 Trans. (Dkt. # 77).)

4 III. ANALYSIS

5 A. Legal Standard: Discovery Sanctions

6 1. Inherent Power

7 Courts are invested with inherent powers that are "governed not by rule or statute
 8 but by the control necessarily vested in courts to manage their own affairs so as to
 9 achieve the orderly and expeditious disposition of cases." *Chambers v. NASCO, Inc.*, 501
 10 U.S. 32, 43 (1991) (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 630-31 (1962)). The
 11 Ninth Circuit "has recognized as part of a district court's inherent powers the broad
 12 discretion to make discovery and evidentiary rulings conducive to the conduct of a fair
 13 and orderly trial." *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d
 14 363, 368 (9th Cir. 1992). Additionally, a district court "has the inherent authority to
 15 impose sanctions for bad faith, which includes a broad range of willful improper
 16 conduct." *Fink v. Gomez*, 239 F.3d 989, 992 (9th Cir. 2001).

17 Sanctions issued under a court's inherent power against a party or party's attorney
 18 "are available if the court specifically finds bad faith or conduct tantamount to bad faith."
 19 *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1107-08 (9th Cir. 2002) (quoting *Fink*, 239
 20 F.3d at 994). Bad faith is demonstrated by "delaying or disrupting the litigation or
 21 hampering enforcement of a court order." *Id.* (quoting *Hutto v. Finney*, 437 U.S. 678,
 22 689 n.14 (1978)). Conduct "tantamount to bad faith" includes "a variety of types of

1 willful actions, including recklessness when combined with an additional factor such as
 2 frivolousness, harassment, or an improper purpose.” *Id.* (quoting *Fink*, 239 F.3d at 994).

3 Although the Ninth Circuit has declined to decide the precise standard of proof for
 4 sanctions awards, it is clear that a bad faith finding supported by clear and convincing
 5 evidence will suffice. *See Lahiri v. Universal Music & Video Distrib. Corp.*, 606 F.3d
 6 1216, 1219 (9th Cir. 2010) (declining to resolve burden of proof issue because clear and
 7 convincing evidence supported the district court’s bad faith finding); *In re Lehtinen* 564
 8 F.3d 1052, 1061 n.4 (9th Cir. 2009) (same); *Fink*, 239 F.3d at 989 (same). Upon a
 9 finding of bad faith, courts can levy an assortment of sanctions under their inherent
 10 power, including monetary awards, attorneys’ fees, adverse inference jury instructions,
 11 and even dismissal of claims. *Apple, Inc. v. Samsung Elecs. Co., Ltd.*, 881 F. Supp. 2d
 12 1132, 1135 (N.D. Cal. 2012) (collecting cases); *see also Chambers v. NASCO, Inc.*, 501
 13 U.S. 32, 43 (1991). Sanctions may extend to both parties and counsel. *See, e.g., Barnd v.*
 14 *City of Tacoma*, 664 F.2d 1339, 1342 (9th Cir. 1982) (“A trial court’s inherent powers
 15 unquestionably include the power to assess attorney’s fees against any counsel who
 16 willfully abuses judicial process or otherwise conducts litigation in bad faith.”); *Primus*
 17 *Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 649 (9th Cir. 1997) (reviewing district
 18 court’s sanction of attorney under inherent powers); *Tuttle v. Combined Ins. Co.*, 222
 19 F.R.D. 424, 432 (E.D. Cal. 2004) (imposing \$5000.00 fine against attorney).

20 **2. Spoliation of Evidence**

21 Spoliation of evidence falls within the court’s inherent power to sanction. *Glover*
 22 *v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993) (“A federal trial court has the inherent

1 discretionary power to make appropriate evidentiary rulings in response to the destruction
2 or spoliation of relevant evidence.”) Spoliation of evidence is the “failure to preserve
3 property for another’s use as evidence, in pending or future litigation.” *Kearney v. Foley*
4 & *Lardner, LLP*, 590 F.3d 638, 649 (9th Cir. 2009). A party’s “duty to preserve evidence
5 is triggered when a party knows or reasonably should know that the evidence may be
6 relevant to pending or future litigation.” *E.E.O.C. v. Fry’s Elecs., Inc.*, 874 F. Supp. 2d
7 1042, 1044 (W.D. Wash. 2012); *see also Leon v. IDX Sys. Corp.*, C03-1158 P, 2004 WL
8 5571412, at *3 (W.D. Wash. Sept. 30, 2004) *aff’d*, 464 F.3d 951 (9th Cir. 2006). Once
9 triggered, this duty extends to any documents or tangible items that the party knows or
10 should know are relevant to the litigation, as well as to documents in the possession of
11 employees who are “key players” in the case. *Apple*, 881 F. Supp. 2d at 1137 (citing
12 *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003)). If a company
13 has a document retention policy, the company is obligated to suspend that policy and
14 implement a litigation hold to ensure the preservation of relevant documents. *Apple*, 881
15 F. Supp. 2d at 1137 (imposing sanctions for failure to institute litigation hold); *see, e.g.*,
16 *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1070 (N.D. Cal. 2006) (same).

17 In the context of spoliation of evidence, the Ninth Circuit has “confirmed the
18 power of the district court to sanction under its inherent powers not only for bad faith, but
19 also for willfulness or fault by the offending party. *Unigard*, 982 F.2d at 371; *see also*
20 *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006). A party’s failure to preserve
21 evidence “qualifies as willful spoliation if the party has some notice that the documents
22 were *potentially* relevant to the litigation before they were destroyed.” *Leon*, 464 F.3d at

1 959 (quoting *United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1001 (9th Cir.
 2 2002)); *see also In re Napster*, 462 F. Supp. 2d at 1066 (“District courts may impose
 3 sanctions against a party that merely had notice that the destroyed evidence was
 4 potentially relevant to litigation.”) “In the Ninth Circuit, spoliation of evidence raises a
 5 presumption that the destroyed evidence goes to the merits of the case, and further, that
 6 such evidence was adverse to the party that destroyed it.” *Apple*, 888 F. Supp. at 993.

7 Counsel bear responsibility for coordinating their clients’ discovery production.

8 *See Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) (“Counsel
 9 must take affirmative steps to monitor compliance so that all sources of discoverable
 10 information are identified and searched.”) As such, counsel’s failure to oversee a client’s
 11 discovery efforts may merit sanctions. *See, e.g., Qualcomm Inc. v. Broadcom Corp.*,
 12 05CV1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan. 7, 2008) *vacated in part*,
 13 05CV1958-RMB (BLM), 2008 WL 638108 (S.D. Cal. Mar. 5, 2008) (sanctioning
 14 attorneys because they “did not conduct a reasonable inquiry into the adequacy of [their
 15 client’s] document search and production and, accordingly, they are responsible, along
 16 with [their client] for the monumental discovery violation”); *R & R Sails Inc. v. Ins. Co.*
 17 *of State of Pa.*, 251 F.R.D. 520, 528 (S.D. Cal. 2008) (imposing sanctions against
 18 attorney for “failure to search for and timely produce electronically-stored information”).

19 **B. Bad Faith**

20 The court finds that there is clear and convincing evidence showing that
 21 Corinthian and Corinthian’s counsel at Payne & Fears have refused to participate
 22 forthrightly in the discovery process and that this refusal constitutes or is tantamount to

1 bad faith. Corinthian's and Corinthian's counsel's discovery tactics, which are detailed
 2 in the following paragraphs, have delayed resolution of Plaintiffs' claims, expended both
 3 the court's and Plaintiffs' limited resources on matters ancillary to the merits, and
 4 threatened to interfere with the rightful decision of this case. Therefore, sanctions are
 5 warranted.

6 To begin, there is no dispute that Corinthian did not issue a litigation hold in this
 7 case. (*See* Banash Dep. at 15; 12/12/13 Trans. at 4-5 (Mr. Brown testifying).) Corinthian
 8 has issued litigation holds in previous actions. (*Id.*) Nonetheless, for this case,
 9 Corinthian only requested that a subset of employees, whom it deemed to be "key"
 10 witnesses, search for and save relevant documents. (*Id.* at 5-7, 12, 18; Ruiz Dec. ¶ 7-8.)
 11 Testimony by some of these "key" witnesses, however, casts doubt on Corinthian's claim
 12 that these employees in fact performed any—let alone a thorough—search for relevant
 13 documents. Specifically, Ms. Austin and Ms. Paulino testified that they did not search
 14 for documents relevant to the litigation, and Ms. Givens and Ms. Phillips testified that
 15 they did not recall searching for documents.⁵ (*See* Martin Decl. Ex. E ("Austin Dep.") at
 16 3, Ex. F ("Givens Dep.") at 7, Ex. I ("Phillips Dep.") at 12, Ex. J ("Paulino Dep.") at 16.)
 17 Such self-selection of a limited pool of discovery materials, combined with doubt as to
 18 what searches, if any, were performed of this pool of materials, gives the court no
 19 confidence in the quality of Corinthian's discovery production. Yet, due to the lack of a

20
 21 ⁵ Two of these employees later impeached themselves in declarations responding to Plaintiffs'
 22 first motion for sanctions; these employees claim that they now remember searching for documents. (*See*
 Austin Decl. (Dkt # 39-13); Givens Decl. (Dkt. # 39-9).)

1 litigation hold, it is not clear that the current additional discovery period, instituted 18
2 months after Plaintiffs filed suit, can remedy this deficiency.

3 Second, there is no dispute that Corinthian deleted Plaintiffs' email accounts, and
4 that the deletion of at least two of the accounts occurred after Corinthian's duty to
5 preserve documents was triggered. Corinthian received EEOC notices on behalf of Ms.
6 Holland and Ms. Knickerbocker on May 4, 2012. (Hainley Decl. ¶¶ 6, 7.) These
7 documents put Corinthian on notice that Plaintiffs' emails may be relevant to potential
8 future litigation. *See Fry's Elecs.*, 874 F. Supp. 2d at 1044. Corinthian's IT Department
9 received Ms. Holland's and Ms. Knickerbocker's termination notices on April 26, 2012,
10 and April 30, 2012, respectively. (Ainsworth Decl. ¶¶ 3-6; Hainley Decl. ¶¶ 4-9.) The IT
11 Department closes a terminated employee's email account and slates it for deletion within
12 24 hours of receiving a termination notice; the system automatically deletes the account
13 30 days later. (12/12/13 Trans. at 9, 29-30 (Mr. Banash testifying).) As such—and as
14 Corinthian's counsel conceded at oral argument—the email account deletions occurred in
15 violation of Corinthian's duty to preserve evidence. (*See id.* at 26 (Mr. Brown
16 speaking).) Under the controlling caselaw outlined above, this situation, without more,
17 would qualify as willful spoliation of evidence that merits sanctions. *See, e.g., Apple*,
18 881 F. Supp. 2d at 1137; *In re Napster*, 462 F. Supp. 2d at 1070; *Leon*, 464 F.3d at 959.

19 Furthermore, with respect to the timing of the deletion of email accounts,
20 Corinthian's attempt to muddy the waters with Mr. Ainsworth's declaration is not well-
21 taken. Corinthian has provided no justifiable reason why, in the face of contrary
22 testimony from its own Rule 30(b)(6) witness, the Senior Information Technology

1 Director of Information Security, Corinthian relied on technical advice from an
 2 admittedly less-knowledgeable source, its own Corporate Counsel. In Mr. Banash's own
 3 words, he is more familiar with the email system than is Mr. Ainsworth (12/12/13 Trans.
 4 at 29); Mr. Ainsworth even admitted that he was not sure when he made the declaration
 5 that the information he was providing was correct (*id.* at 33). Yet Mr. Ainsworth made
 6 no effort to contact Mr. Banash until the eve of oral argument on Plaintiff's first motion
 7 for sanctions. (*Id.* at 33-34.) Corinthian's attempt to influence (if not misdirect) the
 8 court with such unsubstantiated information falls below acceptable standards of
 9 professional conduct.

10 Corinthian argues that, at least with respect to emails, no spoliation has occurred
 11 because Corinthian has since recovered and produced all responsive employee emails
 12 from the backup tapes. The court notes that this argument contravenes what appears to
 13 have been Corinthian's previous position that the backup tapes were not reasonably
 14 accessible.⁶ Corinthian's characterization of the backup tapes has shifted with the winds
 15 throughout this litigation, adopting whatever posture is most convenient in the immediate

16

17 ⁶ Under Rule 26(b)(2)(B): "A party need not provide discovery of electronically stored
 18 information from sources that the party identifies as not reasonably accessible because of undue burden
 19 and cost." Fed. R. Civ. P. 26(b)(2)(B). The appropriate context for determining the accessibility of the
 20 information on Corinthian's backup tapes would have been in a motion to compel. *See* Fed. R. Civ. P.
 21 26(b)(2)(B) Advisory Committee Notes, 2006 Amendments; *see also Mikron Indus., Inc. v. Hurd
 22 Windows & Doors, Inc.*, No. C07-532RSL, 2008 WL 1805727 (W.D. Wash. Apr. 21, 2008) (evaluating
 motion to compel under Rule 26(b)(2)(B)). In such a motion, Corinthian would bear the burden to show
 that accessing the tape would be unduly costly, and Plaintiffs would bear the burden to show good cause
 for allowing discovery—specifically, that Plaintiffs' need for the information on the backup tapes
 outweighed the costs. *Id.* Inasmuch as (1) Corinthian dodged Plaintiffs' motion to compel with an
 ambiguously worded and now-contested stipulation (*see* Stip. Order), (2) the parties continue dispute to
 what extent Plaintiffs were apprised of the nature of the backup tapes, (*see* 1st Reply (Dkt. # 40) at 5-6),
 and (3) Corinthian's counsel never set forth a clear picture of the process of retrieving information from
 the tapes, this option was not available to the court.

1 context. (*Compare* Ruiz Decl. ¶ 17 (“I explained that it was unreasonable and
2 impractical to search them . . .”) *with* 12/12/13 Trans. (“It would be perfect. It would be
3 one day, \$1,000.”) (Mr. Brown testifying).) Corinthian cannot have it both ways. If the
4 information on the backup tapes was unavailable within the meaning of Federal Rule of
5 Civil Procedure 26(b)(2)(B) such that Corinthian was not required to recover it, then the
6 Plaintiffs’ deleted emails were, in fact, spoliated evidence. If, as Corinthian’s counsel
7 represented at oral argument, the information on the backup tapes was accessible, then
8 Corinthian had little basis for refusing to search the backup tapes under the parties’
9 Stipulated Order, no basis for filing a verification with the court affirming that it had
10 searched “all available electronic sources” (*see* Verification at 3), and appears to have
11 assumed a misleading stance with Plaintiffs from the beginning.

12 Corinthian counters that it encountered substantial technical difficulties and costs
13 in retrieving the emails from the backup tapes. (*See* Tetzlaff Decl.) But any obstacles
14 Corinthian faced in recovering the emails were the direct result of Corinthian’s
15 inadequate discovery search, deletion of evidence, and lack of candor with both Plaintiffs
16 and with the court. Such obstacles do not transform bad faith into good.

17 Throughout the course of the litigation, Corinthian did not once provide a straight-
18 forward explanation of the process and cost of extracting information from the tapes. Mr.
19 Ruiz originally estimated that recovery of deleted emails “would take at least three days
20 and could cost thousands of dollars.” (Ruiz 2d. Decl. (Dkt. # 67) ¶ 6.) Yet during
21 discovery, Plaintiffs remained unaware that Corinthian’s backup system differentiated
22 between backup tapes and backup servers, and that Corinthian interpreted the parties’

1 Stipulated Order as excluding backup tapes. (12/12/13 Trans. at 22-25, 31-32 (Ms.
2 Enslow testifying) (“No, your Honor, I did not understand the distinction between backup
3 tapes and backup servers, and Mr. Ruiz never offered his understanding of the distinction
4 of those words.”) Corinthian’s Rule 30(b)(6) witness did nothing to clear up the
5 confusion, despite notice that he was expected to testify on the topic of backup sources.
6 (See Banash Dep. at 9-10; 30(b)(6) Not.) As a result, even as of the first motion for
7 sanctions, Plaintiffs were uncertain as to the function of the backup tapes and remained
8 under the impression that recovery was not an option. (See 12/12/13 Trans. at 23; 1st
9 Reply (Dkt. # 40) at 5 n.4 (“[D]efense counsel suggested that disaster recovery was only
10 available in the event of a catastrophe and was not an option here.”))

11 During the first hearing on sanctions, however, Corinthian’s counsel switched
12 tacks. In an effort to avoid sanctions for spoliating evidence, Corinthian’s counsel
13 painted a particularly optimistic picture of Corinthian’s ability to recover information
14 from the backup tapes. (See *id.* at 17, 20, 27, 38-39 (“And the answer is lying right under
15 our noses. . . . We can go get those tapes. . . . A thousand dollars a day and it is here
16 and we are done.”)) But this testimony quickly proved to be incorrect. Once Corinthian
17 set about retrieving the emails, it consistently failed to meet deadlines—even deadlines
18 that Corinthian imposed on itself and assured the court it could meet. (See Order
19 Compelling Prod. at 4 (December 20, 2013 deadline); PTC Trans. at 28 (same); Enslow
20 Decl. ¶ 4 (December 31, 2013, deadline); 1st Status Rep. at 2 (January 6 and January 13,
21 2014, deadlines); Enslow Decl. ¶ 8 (January 27, 2014 deadline); Brown Decl. ¶¶ 9-10
22 (final production on February 10, 2014).) In light of these facts, the court disagrees that

1 the effort Corinthian expended in attempting to remedy its prior improper discovery
2 behavior in any way excuses or mitigates that behavior. After all, such effort came only
3 as a result of a court order—a court order that relied on Corinthian’s counsel’s
4 representations in open court.

5 In sum, the court finds, by clear and convincing evidence, that Corinthian’s and
6 Corinthian’s counsel’s lackluster search for documents, failure to implement a litigation
7 hold, deletion of evidence, refusal to cooperate with Plaintiffs in the discovery process
8 (particularly as evidenced by its withholding of information regarding both the backup
9 tapes and its interpretation of the parties’ Stipulated Order), reliance on a recklessly false
10 declaration, shifting litigation positions, and inaccurate representations to the court
11 constitute bad faith or conduct tantamount to bad faith.

12 **C. Sanctions**

13 Sanctions should be commensurate to the sanctioned party’s degree of fault and
14 the other party’s prejudice. *See Zest IP Holdings, LLC v. Implant Direct Mfg., LLC*, No.
15 CIV. 10-0541-GPC WVG, 2013 WL 6159177, at *7 (S.D. Cal. Nov. 25, 2013); *Leon*,
16 2004 WL 5571412, at *5; *In re Napster*, 462 F. Supp. 2d at 1066. Accordingly, although
17 the cost of retrieving emails from the backup tapes does not affect the question of
18 whether sanctions are warranted, the court will bear the cost in mind when assessing the
19 appropriate level of sanctions. Plaintiffs ask for a host of sanctions against Corinthian,
20 only some of which are appropriate here.

21 First, there is no basis for a jury instruction that Corinthian intentionally destroyed
22 documents that were presumably damaging to Corinthian. (*See* 2d. Mot. at 11-12.) The

1 recovery of employee emails from the backup tapes has likely avoided spoliation of email
2 evidence. Because no litigation hold was implemented, it is possible that other
3 documentary evidence overlooked by Corinthian's initial self-selected search may have
4 been lost over time. However, mere possibility cannot be the basis for an adverse jury
5 instruction. At this time, Plaintiffs have simply not shown a reason to believe additional
6 categories of documents have been destroyed.

7 The court requested supplemental briefing from the parties regarding any allegedly
8 spoliated documentary evidence. (*See* Plf. Surreply (Dkt. # 78); Def. Surreply (Dkt.
9 # 81).) Plaintiffs have identified certain categories of documents it believes are missing,
10 none of which merit an evidentiary sanction. (*See* Plf. Surreply.) To begin, the
11 handwritten interview notes taken by Pamela Hainley and Jenna Rygol have already been
12 produced—albeit belatedly—by Corinthian. (*See* Interview Notes (Dkt. ## 79-1, 79-2).)
13 The fact that the interview notes were not produced until January 13, 2014—months after
14 Ms. Hainley and Ms. Rygol mentioned the notes in their depositions and one week after
15 the trial was scheduled to begin—highlights the inadequacy of Corinthian's initial search
16 for and production of documents. (*See* 3/21/14 Trans. at 26 (testimony by Corinthian
17 attorney Mr. Brown: “I'm going to do a mea culpa on the timing. They were produced
18 on January 13, 2014.”)) But produced documents cannot form the basis for a spoliation
19 instruction.

20 Plaintiffs also speculate—but provide zero evidence—that certain other categories
21 of documents are missing. Specifically, Plaintiffs argue that Corinthian never produced
22 hard copy documents and computer files maintained in Ms. O'Connell's office, but fail to

1 provide a declaration or other evidence showing that these documents in fact existed.
2 (See Plf. Surreply; *see generally* Enslow Decl. II Exs. A-J (Dkt. # 79-1 to 79-4).) This
3 omission is particularly glaring given that Ms. O'Connell is one of the Plaintiffs in this
4 case. Similarly, Plaintiffs fail to provide any evidence that text messages from Ms. Rygol
5 regarding the events at issue in this case ever existed. (*Id.*) The court cannot base an
6 evidentiary sanction on this record.

7 The remaining categories of allegedly missing documents identified by Plaintiffs
8 are supported only by tenuous evidence of existence and appear to be marginally relevant
9 to the issues in this case. (See, e.g., Plf. Surreply (discussing meeting minutes regarding
10 the "Dream Award selection process" that Ms. Holland believed another employee
11 wrote).) In light of these facts, the court finds that a jury instruction that Corinthian
12 destroyed documents beneficial to Plaintiffs' case would be too strong a thumb on the
13 scales of justice. Plaintiffs have not shown that an evidentiary sanction is warranted.

14 Second, the court denies Plaintiffs' request that Corinthian be prevented from
15 using any documents produced on or after January 6, 2014. (2d Mot. at 12.) Plaintiffs
16 rely on Federal Rule of Civil Procedure 37 for this request, but this Rule is inapplicable
17 to the court's holding today. There is no basis for excluding relevant evidence from the
18 case, especially given that discovery was reopened after that evidence was produced.
19 This case will be tried on its merits.

20 Third, Plaintiffs are entitled to attorneys' fees. It is well-established that a district
21 court may award sanctions in the form of attorneys' fees against a party who acts in bad
22 faith. *See, e.g., Barnd*, 664 F.2d at 1342; *Primus*, 115 F.3d at 648; *Roadway Exp., Inc. v.*

1 | *Piper*, 447 U.S. 752, 767 (1980). As such, the court awards Plaintiffs the costs and
2 attorneys' fees incurred due to Corinthian's bad faith discovery practices. Plaintiffs may
3 recoup costs and fees associated with their first and second motions for sanctions, as well
4 as costs and fees of duplicative discovery reasonably attributable to Corinthian's
5 sanctioned conduct. At the close of the second discovery period, Plaintiffs shall file a
6 separate motion detailing their requested fees for the court's consideration.

7 Finally, the court imposes fines against Corinthian and Corinthian's counsel,
8 Payne & Fears. A court may fine a party or an attorney in order to, among other things,
9 "offset the excess costs caused by [the party's] discovery violations, to punish
10 unacceptable behavior, and as a deterrent to future bad conduct." *E.E.O.C. v. Fry's
11 Electronics, Inc.*, 287 F.R.D. 655, 660 (W.D. Wash. 2012) (imposing fines of \$75,000.00
12 payable to plaintiffs and \$25,000.00 payable to the court); *see also Tuttle*, 222 F.R.D. at
13 432 (imposing \$5000.00 fines each against attorney and party for causing a witness to be
14 unavailable in the hopes that "sanctions will cause counsel to evaluate their standards of
15 professional conduct and hopefully modify their future behavior"). Here, Corinthian's
16 bad faith discovery conduct has delayed the parties' trial date by almost one year, wasted
17 the court's and Plaintiffs' trial preparations, required the court to engage in numerous
18 hearings and status conferences, resulted in more documents being produced after the
19 original scheduled trial date than during discovery itself, and threatened to interfere with
20 the rightful decision of this case. *See Kamatani v. Benq Corp.*, CIV.A. 2:03-CV-437,
21 2005 WL 2455825 (E.D. Tex. Oct. 4, 2005) (imposing sanctions of \$500,000.00 against
22 party for discovery violations). The conduct of Corinthian's counsel at Payne & Fears,

1 namely, Mr. Brown and Mr. Ruiz, has substantially contributed to these adverse
2 consequences. *See R & R Sails*, 251 F.R.D. at 528; *Qualcomm*, 2008 WL 66932, at *12-
3 14; *Carroll v. Jaques Admiralty Law Firm, P.C.*, 110 F.3d 290, 294 (5th Cir. 1997)
4 (affirming imposition of \$7000.00 fine against attorney); *Kleiner v. First Nat. Bank of*
5 *Atlanta*, 751 F.2d 1193, 1209 (11th Cir. 1985) (affirming imposition of \$50,000.00 fine
6 against attorney). Accordingly, the court imposes a fine of \$25,000.00, payable to the
7 court, against Corinthian, and a separate fine of \$10,000.00, payable to the court, against
8 Payne & Fears.⁷

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20 ⁷ In assessing these sanctions, the court is mindful of the principles outlined in *F.J. Hanshaw*
21 *Enterprises, Inc. v. Emerald River Development, Inc.*, 244 F.3d 1128, 1138 (9th Cir. 2001). The court has
22 tailored both the sanctions imposed and the procedures followed with the object of conforming to those
teachings. Accordingly, Corinthian and its attorneys have been given multiple opportunities to present
their case to the court, including two rounds of briefing, an evidentiary hearing, and oral argument.

1 **IV. CONCLUSION**

2 For the foregoing reasons, the court GRANTS Plaintiffs' motions for sanctions
3 (Dkt. # 37, Dkt. # 63). Plaintiffs shall bring a separate motion for attorneys' fees.
4 Corinthian Colleges, Inc. shall, within ten days of this order, pay \$25,000.00 to the Clerk
5 of Court. Corinthian's counsel, Payne & Fears LLP, shall, within ten days of this order,
6 pay \$10,000.00 to the Clerk of Court.

7 Dated this 4th day of April, 2014.

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JAMES L. ROBART
United States District Judge